

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

LINDA CARR,	:	APPEAL NO. C-090918
	:	TRIAL NO. A-0710145
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
CITY OF CINCINNATI,	:	
THOMAS STREICHER, JR.,	:	
and	:	
KYLE SMITH	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendants-appellants, the city of Cincinnati, Police Chief Thomas Streicher, Jr., and Police Officer Kyle Smith, appeal the judgment of the Hamilton County Court of Common Pleas denying their motions to dismiss a suit filed by plaintiff-appellee, Linda Carr.

Carr filed a complaint against the city, Chief Streicher, and Officer Smith. In the complaint, Carr alleged that Smith had “forcibly entered upon the real property and the residence of the Plaintiff, under color of law, without first having filed a criminal complaint against the Plaintiff’s son, Greg James Carr, who was on probation for a criminal offense and arrested him without a complaint or affidavit having been filed.” The complaint further stated that “[a]t the time the Defendants

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

entered \* \* \* upon the property and into the premises, they held the Plaintiff at gunpoint on the ground and shot her dog, a puppy, that she was feeding in the back yard.”

According to the complaint, “[t]he City of Cincinnati failed to investigate the incident involving the deadly use of force and/or discipline the involved police officer for his misconduct. This failure constitutes a policy in violation of the constitutional rights of the plaintiff and clearly establishes ratification of an unconstitutional policy and/or custom by the Defendants.”

The complaint set forth state-law claims for trespass, false imprisonment, conversion, invasion of privacy, and intentional infliction of emotional distress, as well as a claim under Section 1983, Title 42, U.S.Code. In addition to naming the appellants, Carr sued the “City of Cincinnati Police Department.”

The city, Chief Streicher, and Officer Smith filed a motion to dismiss on the basis that they were entitled to governmental immunity. The trial court overruled their motion, and this appeal followed.

In their first assignment of error, the city, Streicher, and Smith argue that the trial court erred in rejecting their motion to dismiss under R.C. Chapter 2744.

In ruling on a motion made under Civ.R. 12(B)(6), the trial court must accept as true all factual allegations made in the complaint and draw all reasonable inferences in favor of the nonmoving party.<sup>2</sup> The court may dismiss a complaint under Civ.R. 12(B)(6) only when the plaintiff can prove no set of facts that would entitle the plaintiff to relief.<sup>3</sup>

We begin with the city’s claim of immunity. Under R.C. 2744.02(A)(1), a municipality is immune from liability for damages in a civil action for injury, death, or loss to person or property allegedly caused by the municipality or its employees where the municipality is engaged in a governmental function such as the provision

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<sup>2</sup> *Mann v. The Cincinnati Enquirer*, 1st Dist. No. C-090747, 2010-Ohio-3963, ¶11.

<sup>3</sup> *O’Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

of police services.<sup>4</sup> R.C. 2744.02(B) lists five exceptions to this grant of immunity, none of which applied in the case at bar. Thus, the city was entitled to immunity with respect to Carr's state-law claims.

We turn now to whether Streicher and Smith were entitled to immunity under R.C. Chapter 2744. A municipal employee is immune from liability unless his actions were outside the scope of his employment or "were with malicious purpose, in bad faith, or in a wanton or reckless manner."<sup>5</sup>

In this case, Carr failed to allege any factual basis to indicate that Streicher had acted with malicious purpose, in bad faith, or in a wanton or reckless manner. As the appellants correctly note, there are simply no concrete facts in the complaint that connect Streicher to the incident in question. Thus, the trial court erred in rejecting Streicher's claim of immunity under R.C. Chapter 2744.

As for Smith, we find no plausible basis for concluding that he had acted maliciously or wantonly in holding Carr at gunpoint. Carr relies heavily on the allegation that Smith was not acting pursuant to a validly filed complaint or affidavit and that he did not have a warrant to arrest her son. But under R.C. 2951.08, there is no requirement that an officer obtain a warrant to arrest a person for an alleged community-control violation. Smith was justified in protecting himself while effectuating the arrest, and there are no factual allegations in the complaint that the restraint was so excessive as to indicate malice or bad faith.

Nonetheless, the complaint does set forth sufficient allegations to support the conversion claim arising from the shooting of Carr's dog. The complaint avers that Smith wrongfully shot the dog while she was feeding it. Accepting as true the facts set forth in the complaint and drawing all reasonable inferences in favor of Carr, we cannot say that she would be unable to prove any set of facts entitling her to relief. Accordingly, we sustain the assignment of error in part and overrule it in part.

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<sup>4</sup> See R.C. 2744.01(C)(2)(a).

<sup>5</sup> R.C. 2744.03(A)(6).

In their second assignment of error, the appellants argue that the trial court erred in overruling their motion to dismiss because Carr sued the “City of Cincinnati Police Department, which was not a legally cognizable entity. We find no merit in this assignment. Although the police department was not a cognizable entity, Carr’s inclusion of the police department as a defendant was mere surplusage and did not warrant the dismissal of Carr’s claims. We overrule the second assignment of error.

In their third and final assignment of error, the appellants argue that the trial court erred in denying their claims of immunity from liability under Section 1983, Title 42, U.S.Code. Although we have addressed the issue of state-law immunity, R.C. 2744.09(E) expressly provides that R.C. Chapter 2744 does not apply to actions brought under federal law.<sup>6</sup> Therefore, we separately address Carr’s federal-law claims.

We begin with the claim against the city. A municipality may not be held liable under a theory of respondeat superior for claims brought pursuant to Section 1983, Title 42, U.S.Code.<sup>7</sup> Rather, the plaintiff must demonstrate that injury arose from an official policy of the municipality.<sup>8</sup>

In this case, Carr argues that the city had failed to investigate Smith’s actions and to discipline him for his wrongdoing, and that this failure implied a policy on the part of the city to condone the misconduct. But where the asserted policy underlying the alleged misconduct is merely the “deliberate indifference” to the misconduct, the plaintiff must demonstrate a history of widespread abuse from which the city’s tacit authorization may be inferred.<sup>9</sup> Because Carr has failed to allege such a pattern in this case, the city was entitled to dismissal.

As for Chief Streicher and Officer Smith, government employees performing discretionary duties are generally shielded from liability unless their actions violate

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<sup>6</sup> See, also, *Chaney v. Norwood*, 1st Dist. No. C-090800, 2010-Ohio-3434, ¶18.

<sup>7</sup> See *Cincinnati v. York Masons Bldg. Assn.*, 1st Dist. Nos. C-080003 and C-080019, 2008-Ohio-4271, ¶31, jurisdictional motion overruled, 120 Ohio St.3d 1505, 2009-Ohio-361, 900 N.E.2d 623.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *Watenza v. Dayton*, 2nd Dist. No. 21984, 2008-Ohio-749, ¶36, citing *Stinnett v. Lutzweit*, 2nd Dist. No. 2002 CA 26, 2002-Ohio-5133, ¶12.

clearly established statutory or constitutional rights of which a reasonable person would have known.<sup>10</sup> This qualified immunity applies to those employees or officials whose decisions are reasonable, even if mistaken.<sup>11</sup>

With respect to Chief Streicher, there are once again no factual allegations to link him to the incident in question. Thus, the trial court's failure to dismiss the federal claims against Streicher was erroneous.

Regarding Smith, he was entitled to qualified immunity for his actions in holding Carr at gunpoint while effectuating the arrest of her son. But because Carr alleged facts that Smith had wrongfully deprived her of property by shooting her dog, the trial court correctly overruled the motion to dismiss as to that federal claim only. We sustain the third assignment of error in part and overrule it in part.

We affirm that part of the trial court's judgment refusing to dismiss the state-law conversion claim against Officer Smith and the Federal Section 1983 claim against the officer involving the shooting of Carr's dog. We reverse the judgment with respect to all the remaining claims and remand the case to the trial court for the dismissal of those claims and for further proceedings consistent with this judgment entry.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., HENDON and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on November 19, 2010

per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>10</sup> *Sosa v. Cincinnati*, 1st Dist. No. C-040021, 2005-Ohio-2449, ¶9, citing *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct 2727.

<sup>11</sup> *Sosa*, supra, at ¶9, citing *Pray v. Sandusky* (C.A.6, 1995), 49 F.3d 1154, 1158.